DORSAY & EASTON LLP

ATTORNEYS AT LAW
1 S.W. COLUMBIA STREET
SUITE 440
PORTLAND, OREGON 97258-2005

Licensed in:
Oregon (*)
Washington (**)
New Mexico (±)

Craig J. Dorsay *, **, ±
Lea Ann Easton *, **

Susan K. Driver *, ±
Of Counsel

September 19, 2013

Ms. Elizabeth Appel
Office of Regulatory Affairs and Collaborative Action
United States Department of the Interior
1849 C Street, N.W.
MS-4141-MIB
Washington, D.C. 20240

Re: Proposed Revisions to the Federal Acknowledgment Regulations, 25 C.F.R. Part 83 – Preliminary Discussion Draft
Comments of the Confederated Tribes of Siletz Indians of Oregon
1076-AF18

Dear Ms. Appel:

I represent the Confederated Tribes of Siletz Indians of Oregon ("Siletz Tribe"). I submit the following comments on behalf of the Siletz Tribe regarding the Department of Interior's Preliminary Discussion Draft proposing revisions to the Federal Acknowledgment Regulations ("FAR"), 25 C.F.R. Part 83. I have some general introductory comments, and then comments regarding specific language and provisions in the discussion draft.

Introductory Comments

The Siletz Tribe has serious concerns about the proposed revisions to the FAR, and opposes those revisions in their present form. If implemented, the proposed revisions will result in a massive cost to the Siletz Tribe and will likely result in decades of litigation in multiple cases. The proposed regulations seriously threaten the legal status and successorship of the Siletz Tribe, as I will explain below.

The Siletz Tribe does not oppose administrative acknowledgment or federal recognition of deserving Indian tribal entities, but the proposed revisions to the FAR go too far and will result in the recognition of Indian entities that lack a legal and political connection to historic Indian tribes and bands. The original FAR regulations adopted in 1978 required proof of continuous tribal existence from "historical" times to the present,

Telephone: (503) 790-9060; Facsimile: (503) 790-9068; Cellular: (503) 939-8022; E-mail: craig@dorsayindianlaw.com

defined as dated back to the earliest documented contact between the aboriginal tribe and citizens or officials of the United States, territorial or colonial governments, or foreign governments from which the United States acquired territory. The 1994 revision to those regulations loosened this requirement, requiring only continuous existence as an American Indian entity since 1900. 25 C.F.R. § 83.7(a). The proposed regulation will loosen this requirement even further, requiring only that the petitioning group comprise a distinct community and have existed as a community from 1934 to the present without substantial interruption. Proposed § 83.7(b). There is no longer any requirement of a continuous political and legal connection to a historical Indian tribe. The only connection required to a historical Indian tribe is that an unnamed percentage of the petitioning group's membership must consist of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity. Proposed § 83.7(e).

Let me explain how this proposed language will detrimentally impact the Siletz Tribe. The Siletz Tribe is a federally recognized Indian tribe. The Siletz Tribe is a confederation of all the Indian tribes and bands and Indians from western Oregon who were settled by the federal government pursuant to federal policy on the 1855 Executive Order "Siletz Coast" Reservation. The Siletz Tribe is the modern day successor in interest as that term has been confirmed in cases such as *United States v. Oregon*, 29 F.3d 481 (9th Cir. 1994), and *United States v. Suquamish Indian Tribe*, 901 F.2d 772 (9th Cir. 1990), to all of the tribes and bands of Indians that were settled on the Siletz Coast Reservation. The Siletz Tribe is the political and legal successor to approximately 30 different tribes and bands. The proposed revisions to the FAR regulations will jeopardize the established successorship of the Siletz Tribe, and force the Tribe to defend its successorship in an unlimited number of future cases, costing the Siletz Tribe massive amounts of time and expense.

As the Department well knows, federal Indian policy did not operate cleanly during the history of this country. For the Siletz Tribe, for example, while numerous tribes and bands of Indians were legally and physically settled on the Siletz Coast Reservation pursuant to treaties, statutes, executive orders and federal administrative action, not every individual from all of these tribes and bands made it to the Siletz Coast Reservation or stayed there. Some individual Indians or small groups avoided round-up and removal; others left the reservation once there for various reasons, and made their way back to aboriginal territory or settled in new communities. As a legal matter, these tribes and bands are considered to have moved to the Siletz Coast Reservation and confederated together in what is now known as the Siletz Tribe. The individual Indians who either never moved to the Siletz Coast Reservation or left that reservation either pursued lives as individuals, or at some later time or place may have tried to organize as a group. These groups run the gamut in time, organization and makeup. They are not; however, the legal or political successors in interest to the historical tribes or bands that located on the Siletz Coast Reservation, confederated together into the Siletz Tribe, and have existed continuously since first European contact as an active political and legal

entity, either separately as an independent tribe or together as the confederated Siletz Tribe.

The Siletz Tribe has been bothered in the last 40 years by numerous groups or entities claiming to be one of the tribes or bands of Indians that settled on the Siletz Coast Reservation and became part of the Siletz Tribe. In most cases, the groups in question are only recently formed and comprise at best a group of people with some descendancy connection to individuals who are connected to a historical Indian tribe. In a number of cases the alleged group does not even have any Indian members, but claims ownership of one of the many historical bands and tribes that used to populate western Oregon. In all these cases, the group claims sole ownership and successorship to whichever historical tribe or band they are allegedly descended from, and reject the Siletz Tribe's statement that the Siletz Tribe is the legal and political successor to that specific tribe or band. I have over 10 separate files from the last 10 years of groups claiming to be one of the tribes or bands that are part of the confederated Siletz Tribe. In most cases, the group is claiming Indian status so it can try to open a casino within the historical territory of the tribe in question. In other cases, the group in question is claiming Siletz historical territory for other purposes.

If the proposed regulations are adopted as drafted, the Siletz Tribe will be inundated with petitions from these and other newly formed remnants or other groups claiming to be one of the tribes or bands that make up the Siletz Tribe. The Siletz Tribe will have to defend its legal status in each and every one of these cases, at massive expense and much time and effort. If petitioning groups are limited to valid, historical Indian tribes and bands, this expense will not occur.

The main issue for the Siletz Tribe is the issue of legal and political successorship to the bands and tribes of Indians that were settled on the 1855 Siletz Coast Reservation. The Confederated Tribes of Siletz Indians is the tribal entity recognized by the United States as the political and legal successor to all of the tribes and bands of Indians that were settled on that reservation. The Siletz Tribe can show continuous existence from before 1853 to the present, and merger and/or confederation of the relevant tribes and bands into the modern day Siletz Tribe. Under the proposed regulations, however, any group of individuals of Indian descent can qualify for recognition as an Indian tribe if they can show that they formed into a "distinct community" around 1934. While the new proposed regulations allow a petitioning group to show community status before 1934 to buttress a claim to tribal status, the regulations don't require such a showing. Qualifying as a tribe under this standard does not require any showing – other than blood descendancy from historical Indians – of a continuous political connection to a historical Indian tribe, or continuous political existence from a historical Indian tribe. Yet these groups will petition under the name of the historical tribe and will claim successorship to the historical tribe and attempt to claim all the rights of that historical tribe once recognized. This will severely, adversely affect the recognized successorship of the Siletz Tribe, and its legal status.

The Siletz Tribe strongly believes, therefore, that the proposed regulations, whatever form they end up in, must state expressly that federal acknowledgment does not result in successorship status to the historical tribe from which individuals in the group might be descended, establishes no precedent that can be used in any other legal proceeding with regard to successorship status, and that successorship status must be established independently in a separate proceeding for such status to attach to any group acknowledged under the regulations.

The Siletz Tribe is aware that its position on successorship might cause a problem with regard to 25 U.S.C. § 476 (f) and (g)(no discrimination with regard to privileges and immunities of tribes0, and 25 C.F.R. § 83.12(a)(newly acknowledged tribe shall be considered a historic tribe), but the Tribe does not believe that any legal problem actually exists. The sections of § 476 were added to the IRA to counter the Department's policy of discriminating between tribes as to which governmental powers they could exercise (authority over tribal land, organization, etc.), based on whether they were a historical or non-historical tribe. The Siletz Tribe is not proposing, no matter how the regulations turn out, that there be discrimination against any validly federally acknowledged tribe with regard to what governmental powers that tribe can exercise.

What the Siletz Tribe is saying and recommending is that the historical/non-historical distinction is no longer useful, and that there are valid proper distinctions in the legal rights that different tribes possess based on their history – treaty status and reservation status being obvious ones – and that these legal distinctions do not run afoul of the language of § 476.

What Siletz does object to is the continued proposed use of language in 25 C.F.R. § 83.12(a) that states that a newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federal recognized historic tribes by virtue of their governmental relationship with the United States. This language is no longer relevant or needed in light of the revised IRA language, particularly if the FAR proposed changes are adopted as currently drafted. The fact is that if a group only has to prove it is has been a distinct community since 1934, it is not being required to prove it is a historic tribe, and is not a historic tribe. The proposed regulations (and even the weakening of the language adopted in 1994, reducing the requirement of proof of existence from first historical contact to 1900) do not and cannot result in the creation of a historic tribe. All this section of the regulations needs to state at this point is that a newly acknowledged tribe will have all of the same rights and privileges as other federally recognized tribes, with no historical reference point. Use of the "historical" reference point made sense only during the period in the late 1980s and early 1990s when the Department distinguished the governmental powers that tribes could exercise depending on whether they were considered by the Department to be a historical or non-historical tribe. Get rid of this distinction now; it is outdated.

I now turn to specific comments on the proposed FAR:

Definitions:

Definition of Historical matches the definition of historical as discussed above by Siletz. This definition reinforces that language must change in § 83.12(a) should be changed because the proof required under the proposed regulation does not match this definition, with regard to result.

Indian group or group: The Siletz Tribe does not understand what "aggregation" means or covers.

"Informed party" and "Interested party": The Siletz Tribe agrees with the distinction proposed here, and upping the status (and rights) for interested parties to more fully comport with the Patchak case. Siletz believes that interested parties should have the right to a full APA due process hearing in any federal acknowledgment proceeding.

Political influence or authority: Siletz agrees with the language in this definition.

Section 83.3:

Subsection (d): The Siletz Tribe strongly objects to this proposed language. It imposes too high of a burden on tribes like Siletz that are successors to many different tribes and bands to show that a petitioning group has "separated" from the main body of a currently recognized tribe. There are many cases where individuals never joined the main tribe because of historical issues. Or individuals left the main body as individuals and then perhaps later formed a group somewhere else. It is the Siletz Tribe's position that if individuals who have formed a group had or have the right to join the modern day tribe and choose or chose not to do so have no right to go off and form their own tribe. The Siletz Tribe believes that allowing individuals of Indian descent to become a tribe just because they formed a group in 1934 undermines the whole concept of tribal sovereign status. Tribal status should be reserved for groups that can show a continuous legal and political connection to a historical Indian tribe.

This objection also applies to confederations of tribes like the Siletz Tribe that were never formally acknowledged by an express federal ruling addressing the scope and nature of the confederation. If the confederation exists as a factual and legal matter, a group that claims to be one of the members of a tribal confederation should not be able to go off and create their own tribe when that group and the tribe it claims a connection to is part of an existing tribal confederation.

Subsection (f): This disqualification should be extended to others claiming to be the same group, so a tribe is not presented with endless reconfigurations of groups that have previously petitioned and been denied.

Section 83.4:

The Siletz Tribe agrees with this change – that a petitioning group must be required to file a documented petition rather than just a letter. A simple letter still requires a response from a threatened recognized tribe, requiring substantial expenditure of time and resources.

Section 83.6:

Subsection (d): The Siletz Tribe disagrees with the standard set out in this section – a preponderance of the evidence supporting claimed facts when viewed in the light most favorable to the petitioner. The standard should be clear and convincing of the facts as actually determined after a full and complete hearing including weighing of evidence and expert and other testimony. As set out in the proposed rule, a group can become an Indian tribe if the facts it alleges might, as viewed in the light most favorable to that group, be true, not whether those facts are necessarily true as determined by an objective decision maker. This standard denigrates the legal status of existing tribes.

Subsection (e): The Siletz Tribe understands that there may be periods of limited evidence or non-existence of evidence, especially with regard to federal documentation of interaction with a tribe. While it should not be required to show documentation of existence at every point in time, there should still be some requirement that would allow a reasoned inference that existence continued during a period of time – i.e., documentation before and after the period in question that would support a logical and reasonable extension that existence continued during the period of limited contact.

Subsection (g): The term "suitable" is insufficiently specific to give petitioning and opposing tribes or groups notice of what kind of evidence is adequate for consideration, and will lead to protracted litigation on the interpretation of the term.

Section 83.7:

Subsection (b): The Siletz Tribe strongly disagrees with the intent of the regulations to change the need to prove existence from "historical times" to just 1934. Such a change will lead to recognition of groups that have no political or legal ties to a historical Indian tribe. If such a standard is adopted, the regulation must say that an acknowledged group cannot claim any connection to a historical tribe until such a historical and/or legal tie is separately established in a different legal forum. The definition of "distinct community" in this section requires no political influence or control, and is inadequate to establish tribal status. Under subsection (1)(ix), political influence is just one method of establishing a distinct community.

Under subsection (b)(3), since the requirements for tribal status have been so substantially watered down that proof only as of 1934 is required, a petitioning group should be required to show continual political existence without substantial interruption.

1934 is when the Indian Reorganization Act was passed and the era of modern Indian relations began, and there should be substantial evidence of existence of a petitioning group.

Subsection (c): As written, the criteria under this subsection would appear to allow a petitioning group to show political influence that is completely unrelated to the historical tribe or tribes from which the petitioning group claims descendancy. Subsection (c)(1)(ii) the membership should consider the actions of the group to be binding, not just of importance. Importance is not sufficiently specific to be of any use in an important determination such as this. Subsection (c)(1)(iv) that a group must have met the criteria of subsection 83.7(b) at more than a "minimal level" is not adequate. The Department is now saying that the petitioning group has to meet the criteria under the regulations, by preponderance, based on the claims of the petitioning group, in a light viewed most favorably to the petitioning group, at more than a minimal level. This is no standard of proof, and will allow a group to qualify as an Indian tribe without even having to prove they exist as a tribe. Subsection (v) must not only show controversy over valued group goals, but resolution or decision on such controversies; otherwise no group exists.

Siletz agrees with the new criteria set out at subsection (c)(2)(v).

Section 83.8:

Subsection (c): A petitioning group should not be able to cite to previous federal acknowledgment at all when a currently recognized tribe is already successor to a historical tribe and the petitioning group would be claiming rights that have already been vested in the existing tribe. Mere descendancy is not sufficient to establish this standard; the petitioning group must be required to show a continuous, exclusive political connection with the historical tribe. Otherwise the treaty relations, federal statute, or collective rights in tribal lands or funds belongs to the existing tribe.

The criteria in subsection (e) are not acceptable to the Siletz Tribe. The criteria as drafted allows a petitioning group to claim the rolls and membership list of a recognized tribe such as Siletz without having to distinguish why the petitioning group should be able to use a membership list or information or membership of an already existing tribe. With regard to the historian statements in subsection (e)(1)(v), there must be an opportunity for full cross examination and scrutiny of any historian or anthropologist statements.

With regard to subsection (f), a petitioning group should not be able to claim persons who are eligible for membership in a recognized tribe but not yet a member of that tribe, where there is no documentation that they have an active political relationship with the petitioning group. The fact that a person eligible for membership in a recognized tribe has not yet applied to become a member of that tribe does not mean they are a member of another tribe or petitioning group.

The Siletz Tribe is of the opinion that the Department must evaluate pre-1934 circumstances as part of the review of any petition under these proposed regulations, even if the regulations were to adopt a 1934 standard, because there has to be some proof, other than mere descendancy, to a historical tribe. Otherwise there must be a conclusive determination that no successorship has been established to the historical tribe.

Section 83.9:

The Siletz Tribe agrees with the notice requirement to existing tribes in subsection (b).

Section 83.10:

The Siletz Tribe disagrees with the language of this section. The language adopted by the Department in this section of the proposed rules demonstrates the Department's bias in favor of recognized groups of Indian descendants as Indian tribes even where such recognition would detrimentally affect the rights of existing Indian tribes. Submissions by petitioning groups are defined as "factual statements" while submissions by interested parties are defined as "factual arguments." Subsection (a). Nothing in a petition submitted by a petitioning group is a fact until it is proven. This language should be changed and the submissions of all parties defined and treated equally.

Subsection (e): An existing tribe should be able to force an acknowledgment determination even where a petitioning group withdraws its petition to avoid a negative determination. Otherwise the recognized tribe remains in limbo and must remain geared up to respond to a renewed or revised petition at any time in the future, costing time and money. A petitioning group may decide to lay back and refile its petition at a time it hopes a recognized tribe will be distracted or otherwise engaged. A recognized tribe should be able to force a final decision on a petition while it has gathered its resources and legal representation, so the matter can be put behind it.

Subsection (g): This section concerns the Siletz Tribe in light of the reduced burden of proof set out in the proposed regulations, as discussed above. A petitioning group's acknowledgment petition could be approved based solely on the claims of that group viewed most favorably in their light, with no opportunity by any other party to contradict or controvert those allegations. Even in the case of a proposed expedited favorable finding, interested parties such as other recognized tribes must be given an opportunity to comment and respond before any favorable finding is made by the Department. The Siletz Tribe also worries about the expedited criteria set out in subsection (3) of this subsection. There must be some objective method of determining whether land was held for that particular petitioning group, rather than – as claimed - for the currently recognized tribe or the bands and tribes that are part of a tribal confederation. History is often more complicated than it may appear from the claims of a petitioning group.

The Siletz Tribe does not believe under subsection (i) that copies of the proposed report should be provided to OHA, since OHA might hear an appeal from any federal acknowledgment determination.

Subsection (k): The BIA has a trust responsibility to recognized tribes, and should be required to provide TA to those tribes to contest any federal acknowledgment petition, in appropriate circumstances.

Subsection (l): Interested parties should have a further opportunity to comment if a petitioning group raised new issues in any response it files with the Department.

Subsection (m): Subsection (2) of this subsection limits the receipt of arguments and evidence from federally recognized tribes located within the same State as the petitioning group. This standard is unduly restrictive. The Siletz Tribe currently knows of several groups in California seeking federal acknowledgment but who also claim an interest in and successorship to historical communities in Oregon that became part of the Siletz Tribe. There should be no in-state restriction in this subsection.

Subsection (n): Recognized tribes should be able to request a hearing on any recognition petition receiving active consideration by the Department, and the scope of such a hearing should include cross-examination of witnesses and use of experts. Comments sent in by a recognized tribe in response to new claims or issues raised in a response by a petitioning group should not be considered unsolicited and should be received by the Department. Interested parties should be treated as full parties in any such hearing.

Subsection (r): The Siletz Tribe disagrees with this section. Decisions are entitled to finality and the Siletz Tribe is entitled to rely upon such decisions in moving forward. A group should not be allowed to endlessly file a federal acknowledgment petition because the Department has once again revised and weakened the standards for federal recognition.

Section 83.12:

Subsection (a): The Siletz Tribe has addressed its objections to defining newly acknowledged tribes as historical tribes above, and incorporates that discussion here.

Subsection (b): The Siletz Tribe does not understand how the BIA will police the newly acknowledged tribe's membership determinations once the tribe is federally recognized, or how the Bureau will impose sanctions on or implement any decision approving or denying a newly acknowledged tribe's changes to their roll.

Subsection (d): This determination or a failure to make such a determination should be specifically defined as final agency action and subject to appeal as appropriate; otherwise the language does not mean anything.

September 19, 2013

This concludes the comments of the Siletz Tribe on the proposed changes to the Federal Acknowledgment Regulations. Please contact me if you have any questions or concerns.

Sincerely,

Craig J. Dorsay

Cc: Siletz Tribal Council